Supreme Court of the United States

October Term, 1961

No. 713

LEON MURRAY,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITIONER'S REPLY

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EDWIN MURRAY,

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v.

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PETITIONER'S REPLY *

Respondent's answer to the instant petition is most remarkable for its omissions. Moreover, in what the answer chooses to discuss, it fails to meet squarely the issues raised in the petition.

I.

Respondent does not defend the holding below of the Court of Appeals for the Second Circuit that a defendant's pre-trial statements are *never* discoverable by him on a pre-trial motion under Rule 16 of the Federal Rules of Criminal Procedure. Indeed, the answer makes no reference whatever to that part of the Second Circuit Court opinion which the petition challenges as erroneous and in conflict with decisions in other Circuits, as well as a departure from decisions of this Court (Pet. 16-20, 38-9; 297 F. 2d at 820).

* Since the filing of the petition for certiorari on February 8, 1962, the decision of the Court of Appeals for the Second Circuit has appeared officially in the advance sheets of the Federal Reporter, Second Series, dated March 5, 1962 (*United States v. Murray*, 297 F. 2d 812, 21 Cir. 1962).

The Second Circuit's holding that petitioner suffered no prejudice from the denial of his statements under Rule 17(c) is based on the limited construction of that Rule by the Court below that such statements were discoverable by him under that Rule only if he himself could put them in evidence (Pet. 39-41; 297 F. 2d at 821). Under Rule 16, however, the Second Circuit found that petitioner's statements were indeed material to the preparation of his defense, but they were not discoverable by him because they did not fall within the category of "books, papers, documents or tangible objects obtained from or belonging to the defendant." (Pet. 38-9, 297 F. 2d at 820). Respondent confuses the separate holdings on Rule 16 and Rule 17(c) by its use at page 11 of its answer of a quotation from a portion of the opinion below that dealt solely with Rule 17(c) and appeared under a specific sub-head to that effect as a holding on both Rules. (See Pet. 39-41; 297 F. 2d at 821-22). If, as petitioner urges, the construction of Rule 16 advanced by the Court below is erroneous, prejudice to petitioner has already been admitted, contrary to respondent's contention.

It is with respect to the square holding of the Court below upholding the denial under Rule 16 that conflict exists as referred to in the body of the petition. Similarly, it is in this context that respondent's answer misinterprets this Court's decision in *Gordon v. United States*, 344 U. S. 414, 417 [illegible], 73 S. Ct. 369, 372 (1953), which, petitioner reiterates, held amongst other things that a pre-trial statement was in the nature of documentary evidence. As such, petitioner contends it is authority for his position that a pre-trial statement is within the category "documents" referred to in Rule 16.*

* Petitioner also urges that the holding below on Rule 17(c) was erroneous (Pet. 15-20).

II.

It was argued in Point I of the petition that the Government violated Section 6(b) of the Administrative Procedure Act, 5 U. S. C. 1005(b), by refusing to give petitioner a copy of or permit pre-trial inspection of the transcript of his testimony given to special agents of the Internal Revenue Service on several occasions (Pet. 13-16). Petitioner there urged upon this Court that the legislative history of Section 6(b) (S. R. 752, 79th Cong. 1st Sess. 1945, pages 19-20; H. R. 1980, 79th Cong. 2d Sess. 1946, page 33), indicates that the wording of that statute is a command to officials of administrative agencies who take testimony from a witness with or without the prior issuance of a subpoena to furnish a transcript of his testimony on demand of the witness, particularly for the witness' use in preparing for subsequent litigation, civil or criminal.

The Government's answer insists on a narrow and restricted construction of Section 6(b), emphasizing the word "compelled" and completely ignoring the fact that the Administrative Procedure Act is ameliorative legislation intended to broaden the rights of persons appearing before administrative agencies. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36-41, 70 S. Ct. 445, 448-50 (1950); *United States* v. *Smith*, 87 F. Supp. 293, 294 (D. Conn. 1949). (Ans. 8-9). The answer misinterprets this Court's decision in *Edwards* v. *United States*, 312 U. S. 473, 61 S. Ct. 669 (1941). (Ans. 10 n. 8). In that case, as here, the Government produced the transcript of the defendant's testimony not when demanded but at a later time of its own choosing. This Court, in reversing the conviction, held that the production of the transcript was not timely for the adequate presentation of the defense. It is submitted that a similar result was obtained by the Government's procrastination in this case.

Respondent seems not to realize the obvious consequences of its narrow construction of Section 6(b), which

would in fact hamper and delay the investigatory function of administrative agencies by leading to the formal insistence by every witness on the prior issuance of a subpoena.

III.

Respondent's answer offers no support for the decision below either in law or in policy. Instead, as it did in the *Edwards* case, the Government asserts that if the refusal of the Courts below to grant pre-trial production of petitioner's testimony was error, it was merely procedural and not prejudicial. This Court answered that contention in *Edwards*:

> "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body." (312 U. S. at 482, 61 S. Ct. at 674).

Respondent's answer makes no reference to the Second Circuit's finding under Rule 16 that petitioner's statements to the Internal Revenue Service were material to the preparation of his defense (Pet. 39; 297 F. 2d at 829). Respondent seeks to minimize that finding by relying on a statement made on information and belief in the affidavit of an Assistant United States Attorney who was not present at the interrogations (R. 26a-27a) that Sloame, petitioner's former representative, "made notes" (Ans. 7, 10). Respondent's further assertion that these notes were available to trial counsel (Ans. 10) is not supported by the record and is contrary to fact. Respondent then concludes that "Had Sloame's (petitioner's former representative who died several months before trial but after the motion) personal knowledge been so necessary, or had his notes been missing, trial counsel would certainly have re-

newed the motion after his death" (Ans. 10). Respondent does not suggest how Sloame's personal knowledge could have benefited or been available to petitioner after Sloame's death. The fact that the motion was not "renewed" on that event gives rise to the plain and correct inference that petitioner and trial counsel were not aware that many of the factual averments in the statements to special agents of the Internal Revenue Service, upon which the Government relied at trial, had actually been made by Sloame. Denial of copies of the statements until after he was no longer available to explain them was severely prejudicial.

What clearly appears throughout the answer is that the Government does take, in one respect, the same position on the pre-trial production of petitioner's statements before this Court that it did in the Courts below. The Government continues to assert that petitioner could have had transcripts of his statements to the Internal Revenue Service for the asking (Ans. 10), while, at the same time, the Government itself opposed his pre-trial motion for copies of those statements, and continues to urge that its opposition and the subsequent denial of relief in the Courts below was proper.

The command of Constitution, Statute, and Rule is to the contrary.

CONCLUSION

The writ should be granted.

Respectfully submitted.

LOUIS BENDER,
Attorney for Petitioner,
170 Broadway,
New York 38, N. Y.

LLOYD A. HALE,
New York City,
of Counsel.